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FILED BY C. Poluzak
DEPUTY

2012 MAY -9 P 3:51

Attorneys for Ft. Harrison Veterans Residence, Limited Partnership

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE,
Limited Partnership,

Petitioner,

vs.

MONTANA BOARD OF HOUSING,

Respondent.

Cause No. ADV 2012-356

**PETITION AND
DEMAND FOR JURY TRIAL**

Petitioner Ft. Harrison Veterans Residence, Limited Partnership ("Ft. Harrison Veterans Residence") hereby seeks judicial review of decisions of the Montana Board of Housing ("MBOH"), and to the extent necessary, a declaratory judgment against the MBOH. In support of its petition, Ft. Harrison Veterans Residence states as follows:

1. Ft. Harrison Veterans Residence is a Florida limited partnership created for the purpose of developing a housing project to serve low income, homeless and/or disabled veterans and their families in historical buildings located on Fort Harrison, outside Helena, Lewis and Clark County, Montana (the "Freedoms Path Project").

2. The MBOH is quasi-judicial executive branch board of the State of Montana which is assigned to the Department of Commerce for administrative purposes only. The MBOH administers and allocates low income housing tax credits ("LIHTC") allocated to Montana pursuant to 26 U.S.C. § 42. MBOH maintains its principal office in Helena, Montana.

3. Jurisdiction and venue are proper in this Court pursuant to §§ 2-4-506, 2-4-702 and 25-2-123, MCA.

4. For 2012, Montana was allocated approximately \$2.5 million in LIHTCs, which are intended to provide an incentive for developers to develop low income housing by providing tax credits which can be used as a source of funding for qualifying projects.

5. The MBOH recently completed the process by which it awarded Montana's LIHTCs for 2012. Ft. Harrison Veterans Residence applied for LIHTCs, but did not receive an allocation from the MBOH.

LIHTC Application and Allocation Process

6. 26 USC § 42 governs the MBOH's award of LIHTC for projects in Montana.

7. The MBOH is required to allocate credits in accordance with a properly developed and adopted Qualified Action Plan ("QAP"). The MBOH's QAP must satisfy the requirements of 26 USC § 42, as well as the Montana Administrative Procedure Act. §§ 2-4-101, et seq., MCA.

8. The MBOH reviewed and distributed the QAP for 2012 for public comment on August 23, 2011. The MBOH accepted public comment and approved the QAP on October 17, 2011. The Governor approved the QAP on November 2, 2011. The QAP sets for the selection criteria and scoring weights the MBOH must apply to Montana LIHTC applications for 2012.

9. The QAP included a scoring preference for Montana based applicants and consultants in violation of the interstate commerce clause of the U.S. constitution.

10. On January 2, 2012, the MBOH filed MAR Notice 8-111-100, proposing to modify ARM 8-111-602 and 603 to correctly incorporate the QAP by reference.

11. On January 20th, 2012, Ft. Harrison Veterans Residence submitted its application for Montana LIHTC. A total of 15 applicants submitted applications within the time allowed.

12. The MBOH held a hearing on February 13, 2012, to hear presentations from all applicants.

13. After the February hearing, the MBOH's staff scored the applications as required by the QAP.

14. The staff incorrectly reduced the scoring for the Freedoms Path Project to 100 points out of a total of 108. If properly scored, the Freedoms Path Project would have scored either 106 or 107.

15. On April 5 2012, Ft. Harrison Veterans Residence sent a letter to the MBOH's staff requesting a correction to its scoring. The MBOH staff did not respond in writing, and verbally refused to correct Ft. Harrison Veterans Residence score. The staff indicated that the scoring was intended only to establish whether a particular project met a threshold score for consideration by the MBOH. According to the QAP and staff, the MBOH retains discretion to allocate LIHTCs to applicants regardless of score.

16. The MBOH met on April 9, 2012, to award the Montana LIHTCs for 2012. The MBOH refused to review the staff's scoring of the Freedom's Path project, and failed to pass a motion to allocate LIHTC to the Freedoms Path Project.

17. The top scorer received a score of 106 and was awarded its full requested LIHTCs for 2012. The other successful applicants had scores of 105.

18. The MBOH violated Ft. Harrison Veterans Residence's substantial rights by refusing to correct the erroneous scoring, and by asserting the scoring is irrelevant because the

MBOH retains absolute discretion to award LIHTCs to projects regardless of score or objective criteria.

19. The MBOH's allocation of LIHTC is arbitrary and capricious and an unwarranted exercise of discretion in that it does not conform to objective standards and is not supported by reasonable evidence or explanation.

20. The MBOH's allocation of LIHTC also violates both federal and state law in that it fails to abide by the objective criteria established in the QAP, and improperly reserves discretion to ignore the objective criteria without explanation.

21. The MBOH's April 9, 2012, decision failed to comply with procedural requirements of MAPA because it was not in writing, and did not contain sufficient findings or conclusions by which a reviewing Court or members of the public could review the MBOH's decision.

22. Ft. Harrison Veterans Residence sought reconsideration of the MBOH's April 9, 2012, allocation decision by letter dated April 23, 2012.

23. At its regularly scheduled meeting on May 3, 2012, the MBOH declined to reconsider its allocation decision.

24. Acts of administrative agencies, including the MBOH, are governed by MAPA.

25. MAPA provides that agency actions fall into one of two categories: 1) rulemaking and 2) contested cases. According to ARM 1.3.211, a "rule is an agency statement of general applicability that interprets law or describes agency requirements. It applies to all persons who are subject to the requirements or regulations of the agency and comes within the terms of the rule. A contested case involves an agency determination that affects the rights or responsibilities of a specifically named party."

26. The MBOH's allocation of LIHTCs for 2012 did not comply with the MAPA requirements for either a rule or a contested case.

COUNT I- JUDICIAL REVIEW

27. The MBOH's allocation of LIHTCs is a contested case governed by MAPA because it was an administrative decision required to be made after a hearing in which the legal rights, duties and privileges of specifically named applicants are determined.

28. Ft. Harrison Veterans Residence is entitled to judicial review of the MBOH's allocation under either §§ 2-4-702.

29. The Court must reverse the MBOH's refusal to correct the scoring for the Freedoms Path Project, as well as the 2012 allocation. The Court must remand the matter with instructions to the MBOH to correct the scoring and to award LIHTCs in accordance with the corrected scoring.

COUNT II- MAPA DECLARATORY JUDGMENT

30. Alternatively, Ft. Harrison Veterans Residence seeks a declaration pursuant to § 2-4-506, MCA, that the MBOH's allocation for 2012 was invalid because it failed to comply with the substantive or procedural requirements for rulemaking under MAPA.

COUNT III- DECLARATORY JUDGMENT

31. Alternatively, Ft. Harrison Veterans Residence seeks a declaration pursuant the Uniform Declaratory Judgment Act that the QAP did not comply with state or federal law governing the awarding of LIHTCs by a Montana administrative agency, reversing the MBOH's April 9, 2012, allocation and ordering the MBOH to apply the QAP criteria objectively, correct the scoring for the Freedoms Path Project, and awarding LIHTCs according to the corrected scores.

COUNT IV- STAY/INJUNCTIVE RELIEF

32. The Freedoms Path Project is time sensitive because its economic viability depends on cooperation from the federal Veterans Administration, availability of historical preservation credits, the current nine percent calculation for LIHTC, and an expected allocation of special project based assistance vouchers for qualifying veterans.

33. A delay until the 2013 LIHTC allocation process creates substantial risk that some or all of that supplemental funding will be unavailable.

34. Ft. Harrison Veterans Residence is entitled to a stay of the MBOH's allocation of LIHTCs pursuant to § 2-4-702(3), MCA, because the improper allocation of credits for 2012, creates the substantial likelihood the Freedoms Path Project will become economically non-viable due to changes in the calculations for future LIHTCs as well as loss of federal funding for other key sources of revenue and capital for the Freedoms Path Project.

35. Alternatively, Ft. Harrison Veterans Residence is entitled to an injunction against the MBOH's allocation of LIHTCs to preserve the status quo during the pendency of this action and to preserve a sufficient portion of the 2012 LIHTC allocation to provide meaningful relief to Ft. Harrison Veterans Residence if the Court finds in its favor.

WHEREFORE, Ft. Harrison Veterans Residence requests the Court enter the following:

1. An order granting Ft. Harrison Veterans Residence's request for judicial review and reversing the MBOH's denial of Ft. Harrison Veterans Residence's application for LIHTC;
2. An order declaring the MBOH's award of LIHTCs for 2012 invalid and illegal, and requiring allocation to the Freedoms Path Project;
3. For an injunction or stay against the MBOH preventing it from allocating the 2012 LIHTCs during the pendency of this action;

4. For attorneys fees and costs: and
5. All other just and equitable relief.

Jury Demand

Ft. Harrison Veterans Residence hereby demands a jury trial on all issues so triable.

Dated this 9th of May, 2012.

CROWLEY FLECK PLLP

By 

Michael Green

Attorneys for Ft. Harrison Veterans Residence, L.P.

CERTIFICATE OF SERVICE

I, Michael Green, hereby certify that on the 7th day of May, 2012, I mailed via U.S. Mail a true and correct copy of the foregoing to the following:

Greg Gould
Luxan & Murfitt, PLLP
Montana Club Building
24 West Sixth Avenue, 4th Floor
P.O. Box 1144
Helena, MT 59624-1144

A handwritten signature in black ink, appearing to read "M. Green", is written over a horizontal line.